

Page 1

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 08-13555-scc

4 - - - - - x

5 In re

6 LEHMAN BROTHERS HOLDINGS INC., et al.,

7 Debtor.

8 - - - - - x

9 Case No. 08-01420-scc (SIPA)

10 - - - - - x

11 In re

12 LEHMAN BROTHERS INC.,

13 Debtor.

14 - - - - - x

15

16 U.S. Bankruptcy Court

17 One Bowling Green

18 New York, NY 10004

19 May 10, 2016

20 10:02 AM

21

22 B E F O R E :

23 HON SHELLEY C. CHAPMAN

24 U.S. BANKRUPTCY JUDGE

25

Page 2

1 Hearing re: Doc #13494 Trustees Motion for Authorization to  
2 Sell Certain Debt Instruments Pursuant to SIPA Section  
3 78ffff-1(b) and Sections 105 and 363 of the Bankruptcy Code  
4  
5 Hearing re: Doc #13493 Trustees Motion for an Order  
6 Authorizing the Abandonment of Certain Lehman Brothers Inc.  
7 Data  
8  
9 Hearing re: Doc #12194 Trustee's Motion for an Order  
10 Regarding Certain Repurchase Agreement Claims  
11  
12 Hearing re: Doc #51685 Amended Omnibus Application of  
13 certain members of the Official Committee of Unsecured  
14 Creditors for payment of fees and reimbursement of expenses  
15  
16 Hearing re: Doc #52574 Second Motion in Aid of Alternative  
17 Dispute Resolution Procedures Order for Indemnification  
18 Claims of the Debtors Against Mortgage Loan Sellers  
19  
20 Hearing re: Doc #51006 Plan Administrators Five Hundred  
21 Ninth Omnibus Objection to Claims (No Liability Claims)  
22  
23 Hearing re: Doc# 13592 Statement / Notice of Revised  
24 Proposed Order Authorizing the Abandonment of Certain Lehman  
25 Brothers Inc. Data (related document(s)13493)

Page 3

1      **Hearing re: Doc# 13595 Notice of Hearing / Notice of Agenda**  
2      **of Matters Scheduled for the Ninety-Seventh Omnibus and**  
3      **Claims Hearing on May 10, 2016 at 10:00 a.m.**

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25      **Transcribed by: Sonya Ledanski Hyde**

1 A P P E A R A N C E S :

2

3 WEIL GOTSHAL & MANGES

4 Attorneys for Lehman Brothers Holdings, Inc. and its  
5 affiliated Debtors

6 787 Fifth Avenue

7 New York, NY 10153

8

9 BY: JACQUELINE MARCUS

10 CANDACE M. ARTHUR

11

12 SHAPIRO BIEGING BARBER OTTESON

13 Counsel for Ironbridge Homes LLC, Ironbridge Mountain  
14 Cottages, Ironbridge Aspen Collection, LLC

15 4582 S. Ulster Street Pkwy, Suite 1650

16 Denver, Colorado 80237

17

18 BY: DUNCAN E. BARBER

19 TRACY KLESTADT

20

21

22

23

24

25

1 COVINGTON & BURLING LLP

2 Attorney for Wilmington as Indenture Trustee

3 620 Eighth Avenue

4 New York, NY 10018

5

6 BY: DIANNE COFFINO

7

8 SHEPPARD MULLIN RICHTER & HAMPTON LLP

9 Attorney for Bank of New York Mellon

10 Four Embarcadero Center, 17th Floor

11 San Francisco, CA 94111

12

13 BY: MICHAEL AHRENS

14

15 HUGHES HUBBARD & REED

16 Attorney for Mr. Giddens, the LBI Trustee

17 One Battery Park Plaza

18 New York, NY 10004

19

20 BY: JEFFREY MARGOLIN

21 MARLENA C. FRANTIZIDES

22 MICHAEL E. SALZMAN

23

24

25

1 WOLLMUTH MAHER & DEUTSCH LLP

2 Attorney for the Debtors

3 500 5th Avenue, #12

4 New York, NY 10110

5

6 BY: FLETCHER W. STRONG

7 JIM LAWLER

8

9 DAVID J. HOFFMAN

10

11 MILBANK, TWEED, HADLEY & MCCLOY LLP

12 Attorney for Official Committee of Unsecured Creditors

13 28 Liberty Street

14 New York, NY 10005

15

16 BY: DENNIS C. O'DONNELL

17 DAVID COHEN (TELEPHONICALLY)

18

19 KLEINBERG KAPLAN

20 Attorney for Elliott Management Corp.

21 551 Fifth Avenue

22 New York, NY 10176

23

24 BY: MATTHEW J. GOLD

25

Page 7

1

2 STROOCK & STROOCK & LAVAN LLP

3 Counsel for Mizuno Bank LTC

4 180 Maiden Lane

5 New York, NY 10038

6

7 BY: CLAUDE SZYFER

8 SHERRY MILLMAN

9

10 STADTMAUER & ASSOCIATES

11 Attorney for Creditor

12 370 Lexington Avenue, Suite 1703

13 New York, NY 10017

14

15 BY: MARC A. STADTMAUER

16

17 UNITED STATES DEPARTMENT OF JUSTICE

18 Attorney for U.S. Trustee

19

20 BY: ANDREA SCHWARTZ

21 SUSAN D. GOLDEN

22

23 ALSO APPEARING TELEPHONICALLY:

24 JEANNE DARCEY

25 ERIC J. KILEY

1 MICHAEL G. LINN

2 PATRICK MOHAN

3 ROBERT PADWAY

4 AMJAD M. KHAN

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 P R O C E E D I N G S

2 THE COURT: Please have a seat. How is everyone  
3 today? All right, I'm ready when you are.

4 MR. MARGOLIN: Good morning, Your Honor.

5 THE COURT: Good morning.

6 MR. MARGOLIN: Jeffrey Margolin, Hughes Hubbard &  
7 Reed for Mr. Giddens, the LBI Trustee. We have three  
8 matters on the LBI portion of the agenda this morning.

9 THE COURT: Yes.

10 MR. MARGOLIN: Two are uncontested and one is  
11 contested. If it's okay with you, we'll proceed with the  
12 order set forth in the agenda.

13 THE COURT: Certainly.

14 MR. MARGOLIN: Your Honor, the first matter on the  
15 agenda is the Trustee's uncontested motion for authority to  
16 abandon and destroy certain data and documents maintained by  
17 the LBI estate.

18 With many phases of liquidation complete, this  
19 motion is the second in a series of abandonment motions that  
20 the Trustee anticipates filing with the Court as its  
21 professionals determine that certain documents and data are  
22 no longer necessary to effectuate the remaining work streams  
23 and thereby are ripe for abandonment and destruction,  
24 furtherance of the Trustee's goals of reducing  
25 administrative expenditures and facilitating an orderly

1 closure of the estate.

2 Your Honor approved a prior abandonment motion  
3 back in February 2015 and that has been effectuated. Today,  
4 Your Honor, on the current motion, we seek authority to  
5 abandon and destroy certain electronic databases legacy  
6 database archives, backup tapes, certain paper documents and  
7 other wind-down materials as further described in the  
8 motion.

9 The abandonment of this data and documents will  
10 provide substantial cost savings to the LBI estate. We  
11 received a number of inquiries, Your Honor, regarding the  
12 motion. Two enquiries from Barclays, and Claimants subject  
13 to the Trustee's 260th omnibus objection to general Creditor  
14 claims, what we call the A Katz Claimants, which is fully  
15 submitted before Your Honor, focused on certain of the  
16 electronic databases.

17 After discussions with these parties, we  
18 identified and determined that certain folders, what we call  
19 the Libby discovery database, this was the database that was  
20 created for attorney work product in connection with the  
21 Libby litigation, which was resolved in 2013, contained  
22 certain documents and data received from or produced to  
23 third parties in which the Trustee may not have access to  
24 original source materials that would allow him to replicate  
25 this particular data and documents.

Page 11

1                   This is a very small amount of data and documents,  
2 less than one million of the approximately 23 million data  
3 and documents contained in this database.

4                   As a result, Your Honor, although there is no use  
5 to the Trustee of these data and documents but it costs the  
6 estate approximately \$50,000 to maintain these folders in  
7 the database per year, we've agreed to carve this out from  
8 the abandonment motion.

9                   This carve-out is reflected in the revised  
10 proposed order filed with the Court yesterday. Again, Your  
11 Honor, no responses were received to the motion. SIPC  
12 supports this motion, and Mr. Caputo is in the courtroom  
13 today.

14                   Unless the Court has any questions, the Trustee  
15 respectfully requests entry of the revised proposed order as  
16 yet another step toward winding down and closing the estate.

17                   THE COURT: All right, very well. Let me ask if  
18 anyone in the courtroom wishes to be heard with respect to  
19 the Trustee's motion for an order authorizing the  
20 abandonment of certain Lehman Brothers, Inc. data. All  
21 right, very well, we'll enter the order. Thank you.

22                   MR. MARGOLIN: Thank you, Your Honor. We'll  
23 submit an order. The next matter will be handled by my  
24 colleague, Marlena Frantzides.

25                   THE COURT: Thank you.

1 MR. MARGOLIN: Thank you.

2 THE COURT: Good morning.

3 MS. FRANTZIDES: Good morning, Your Honor.

4 Marlena Frantzides of Hughes Hubbard & Reed on behalf of the  
5 SIPA Trustee. The second matter on the LBI hearing agenda  
6 today is the Trustee's motion for authorization to sell  
7 certain debt instruments supported by the declaration of  
8 Christopher K. Kiplok, who is in the Courtroom today. The  
9 motion is uncontested.

10 By this motion, the Trustee is seeking  
11 authorization to sell three cross-collateralized,  
12 subordinated bonds relating to the Harvest Grove, Schering  
13 Park and Tarrant County Housing projects, which I will refer  
14 to as the debt instruments.

15 These debt instruments were issued during the  
16 course of the liquidation when certain prior subordinated  
17 bonds were cancelled in connection with the sale of the  
18 underlying housing projects.

19 Each one of the debt instruments is highly  
20 subordinated, so the Trustee determined, in conjunction with  
21 his financial advisors, that it was unlikely they were to  
22 have any real economic value to any party outside of the  
23 capital structure.

24 So, after negotiating in negotiations and  
25 discussions with other debt holders, which includes LBHI,

1 who holds subordinated bonds related to Sunset Ridge, which  
2 is another housing project within the capital structure,  
3 Merrill Lynch, the sole senior bondholder made an offer to  
4 purchase the debt instruments for \$1 million dollars.

5 As of April 19th, when this motion was filed,  
6 Merrill Lynch was the highest bidder and only party that had  
7 made a firm offer to purchase the debt instruments, however  
8 the motion made clear that to the extent there was any other  
9 interested party, the Trustee would consider higher or  
10 better offers up to and until Thursday, May 5th, 2016.

11 On Thursday, May 5th, LBHI made an overbid of \$1.1  
12 million dollars for the debt instruments, so on Friday, May  
13 6th, a competitive auction was conducted by the Trustee's  
14 professionals, representatives from LBHI and Merrill Lynch  
15 attended the auction and bidding proceeded with each party  
16 bidding in increments of at least \$100,000.

17 Merrill Lynch was the winner of the auction, so  
18 bidding the highest bid for \$4.7 million dollars and I'm  
19 happy to report, Your Honor, that we're prepared to go  
20 forward with the sale of the debt instruments for the  
21 purchase price of \$4.7 million to Merrill Lynch today.

22 Additionally, during the course of the discussion,  
23 LBHI approached the Trustee's professionals requesting that  
24 it be made clear that the sale of the LBI debt instruments  
25 did not affect LBHI's rights with respect to these Sunset

1 Ridge subordinated bonds.

2 The Trustee, Merrill Lynch and LBHI were able to  
3 reach an agreement regarding appropriate language and that  
4 is reflected in the revised order and amended assignment  
5 agreement filed into the Court on Friday, May 6th.

6 The Trustee has determined, in consultation with  
7 his professionals, that the sale of the debt instruments to  
8 Merrill Lynch for -- excuse me, \$4.7 million, represents the  
9 best means of maximizing the value of the debt instruments  
10 for the benefit of the LBI estate and Creditors and no  
11 responses were received to the motion.

12 Accordingly, the Trustee respectfully requests  
13 that Your Honor grant the motion and approve the sale of the  
14 debt instruments to Merrill Lynch.

15 THE COURT: All right. For purposes of good  
16 order, shall we enter Mr. Kiplok's declaration into the  
17 record?

18 MS. FRANTZIDES: Yes.

19 THE COURT: All right. And ask, is there anybody  
20 here who would like to cross-examine Mr. Kiplok? Does  
21 anyone else have anything they wish to say with respect to  
22 the Trustee's motion for authorization to sell the debt  
23 instruments that have been described? All right, I  
24 congratulate the Trustee for constructing a process that  
25 generated so much value for the estate for the benefit of

Page 15

1 the unsecured Creditors, since, as I think everyone knows,  
2 the customer claims have been paid in full, so I will  
3 happily approve the motion. Thank you.

4 MS. FRANTZIDES: Thank you, Your Honor. All  
5 right, so that brings us to the motion regarding the repo  
6 claims?

7 MR. HOFFMAN: Correct.

8 THE COURT: All right. And I take it you are Mr.  
9 Hoffman?

10 MR. HOFFMAN: Yes, I am, Your Honor.

11 THE COURT: All right, very well. I've read the  
12 papers, which I found -- I find the situation very dismaying  
13 and I'm struggling to understand what it is, Mr. Hoffman,  
14 that you think happened and what you think ought to happen.  
15 We have a legal issue that has been up to the Supreme Court,  
16 cert denied. It's as final as it gets.

17 Moreover, the path to that point is -- includes  
18 stipulation that your clients signed while they were  
19 represented by the Clearly Gottlieb firm that made crystal  
20 clear that once there was a final order on the status of  
21 these repurchase claims, your clients would be bound by  
22 that, and there were certain conditions that were imposed,  
23 which were not satisfied by the rulings that were issued  
24 through the Second Circuit.

25 But now we're here and you seem to be taking the

Page 16

1 position that none of that happened, that you ought to get  
2 discovery and I'm just at a loss, really, to understand.

3 And also I think that your reaction to the  
4 Trustee's suggestion that proceeding would be a violation of  
5 the stipulation, which you characterize as -- I think you  
6 use the word "hectoring," to me, is an appropriate, heads up  
7 if you will, that the Trustee can't figure out why or how  
8 you have an avenue to pursue your current claims. So I  
9 think, unless you have something additional you'd like to  
10 add, that it might be most expeditious to hear from Mr.  
11 Hoffman first.

12 MR. SALZMAN: That works for me, thank you, Your  
13 Honor.

14 THE COURT: Okay, thank you.

15 MR. HOFFMAN: Good morning, Your Honor.

16 THE COURT: Good morning.

17 MR. HOFFMAN: I believe our position starts with  
18 the word of the stipulation itself that was signed, that  
19 says in Paragraph 1, that the non-participating Claimants,  
20 of which my clients are among that group, will not serve nor  
21 be subject to discovery with respect to any of the non-  
22 participating objections unless and until the representative  
23 objections have been litigated to a final order, or have  
24 been settled.

25 THE COURT: Okay.

1                   MR. HOFFMAN: To me, that does not exclude the  
2 possibility of discovery that indicates that there can be  
3 discovery after the representative cases --

4                   THE COURT: Well, but that's putting the cart  
5 before the house because that --

6                   MR. HOFFMAN: Okay, well that's Paragraph 1.

7                   THE COURT: -- that provision, to me, that  
8 provision was crafted -- I don't know this, but it's common  
9 sense, that that provision was crafted to deal with the  
10 situation in which someone said that there was a factual  
11 issue with respect to the paper that constitutes a repo  
12 claim, which has not occurred here.

13                  MR. HOFFMAN: I can get to the substance if you --  
14 if I will but I'll just go through the -- the next paragraph  
15 of the stipulation says --

16                  THE COURT: Which paragraph are you on?

17                  MR. HOFFMAN: Paragraph 2.

18                  THE COURT: Okay.

19                  MR. HOFFMAN: And it says: "Any legal rulings made  
20 by the Bankruptcy Court," and all the other courts --

21                  THE COURT: Right.

22                  MR. HOFFMAN: "shall apply in any litigation with  
23 respect to the non-participating objections. That does not  
24 say -- that does not say that their result is your result.  
25 It says that the rulings from the other cases will apply in

1 our litigation. It simply does not say what the Trustee  
2 says it says.

3 THE COURT: Okay, well, what do you -- okay, so I  
4 hear the words, but what -- so the Second Circuit has ruled  
5 --

6 MR. HOFFMAN: Okay, I can explain how our cases is  
7 different, if you'd like me to.

8 THE COURT: Well, let's just stick with this for a  
9 moment, okay?

10 MR. HOFFMAN: Okay.

11 THE COURT: The Second Circuit has ruled that the  
12 repo claims, which it examined --

13 MR. HOFFMAN: No, they've only examined one, Your  
14 Honor, correct?

15 THE COURT: Yes. Issued pursuant to the same  
16 master agreement as yours.

17 MR. HOFFMAN: I don't know if it was precisely the  
18 same, but similar.

19 THE COURT: I think it's the same.

20 MR. HOFFMAN: Okay.

21 THE COURT: Okay? They said that those claims are  
22 not customer claims.

23 MR. HOFFMAN: Correct.

24 THE COURT: Okay? And so what you're -- I think  
25 where you're going with this is that there are other facts

Page 19

1 and circumstances incident to your client's relationship  
2 with LBI that somehow would enable you to distinguish your  
3 claims from those claims.

4 MR. HOFFMAN: Well, first of all, there was only  
5 one claim and the Court itself, the Second Circuit  
6 explicitly held -- if there's one thing the Second Circuit  
7 clearly held is that if you can show entrustment, then you  
8 are a SIPA customer Claimant, SIPA -- you're a SIPA  
9 customer, okay? The Court said that. The Court didn't say  
10 anything about repos in general or anything like that. It  
11 did say Doral did not have a customer claim. It didn't say  
12 you could never be a customer -- a repo agreement somehow  
13 negates customer status based on anything else. It doesn't  
14 say that in there. It says Doral doesn't have one and I'll  
15 explain while Doral is a reverse repo --

16 THE COURT: I'm pretty sure that the Second  
17 Circuit thought that they were saying the opposite of what  
18 you're saying. I'm pretty sure that the Second Circuit  
19 thought that they were saying that a claim of the type that  
20 was before them --

21 MR. HOFFMAN: Okay.

22 THE COURT: -- right, was not a customer claim,  
23 and in so doing, what the analysis that they were applying  
24 was looking at whether or not there was entrustment and they  
25 found in that connection that in connection with a repo

Page 20

1 claim, there was not. Their ruling was not this is a repo  
2 claim but the world at large, if you can demonstrate or  
3 allege entrustment, you don't fall within the ambit of the  
4 ruling.

5 That's not a fair reading of what the Second  
6 Circuit did and this isn't the only case where time after  
7 time, folks seek to distinguish themselves from certain  
8 rulings regarding customer status. There was a series of  
9 appeals related to First Bank Puerto Rico matter in which  
10 there were rulings related to customer status and a  
11 subsequent Claimant came in and said, but that doesn't apply  
12 to me because X, Y and Z.

13 Here, the extraordinary thing about this is that a  
14 fair reading of the Second Circuit's ruling precludes the  
15 allowance of your client's claims as customer claims by  
16 itself, but in addition, your clients signed a stipulation  
17 in which they agreed to certain rules of the road, and now  
18 you're coming back and saying that the words on that page,  
19 which they signed, don't mean what they say. And that's --  
20 that's pretty extraordinary.

21 MR. HOFFMAN: Well, if I may, I mean, would the  
22 Court like me to explain why I think this claim was  
23 different than the one that was before the Second Circuit?

24 THE COURT: Well, you first have to navigate your  
25 way through the stipulation, which --

1 MR. HOFFMAN: Okay.

2 THE COURT: -- which --

3 MR. HOFFMAN: Sorry.

4 THE COURT: You didn't read the last phrase in  
5 Paragraph 2, which is that it applies unless the Court  
6 expressly provides in a ruling that such legal rulings shall  
7 not apply to the non-participating objections, then it gets  
8 even more specific because there is the prohibition in  
9 Paragraph 3 that you can't seek to distinguish your own  
10 claim. So, we have belt and we have suspenders.

11 MR. HOFFMAN: Okay, can I take those one at a  
12 time?

13 THE COURT: Sure. Mm hmm.

14 MR. HOFFMAN: Okay. First of all, now, what does  
15 that mean, expressly provides in any ruling shall not apply  
16 to the non-participating objection? So does the mean that  
17 the Second Circuit was going to say, we're deciding Doral's  
18 case but these other people are before the Bankruptcy Court  
19 who are not before us, that doesn't apply to them? I don't  
20 think you can agree to a thing like this. I don't think you  
21 can agree and say, well, if the Court goes off, you know --  
22 I think that what happened is the Court did see -- the Court  
23 --

24 THE COURT: But you -- wait -- just to review,  
25 your clients represented by Cleary Gottlieb, signed the

1 stipulation. It's a contract and it's a court order.

2 MR. HOFFMAN: Okay.

3 THE COURT: Okay? But now you're saying, boy,  
4 that was crazy. Why did they agree to that?

5 MR. HOFFMAN: The Court did expressly say that  
6 there is a group of people who would not be covered by this  
7 ruling and those are people who can have and show  
8 entrustment. They didn't call us out by name. it doesn't  
9 say Diego Katz, it doesn't say Marcello Katz. It doesn't  
10 say the parties to the stipulation of June, whatever, 2011.  
11 It says --

12 THE COURT: Do you have a view as to why all the  
13 other non-participating claimants who signed this  
14 stipulation are not standing here with you today and who  
15 accepted their status as unsecured Claimants rather than  
16 customer Claimants?

17 MR. HOFFMAN: First of all, I think it's -- all of  
18 them appear to be some sorts of institutions. I think as  
19 Mr. Salzman was indicating, I think one of the other Cleary  
20 Gottlieb clients was Goldman Sachs something or other. This  
21 is an entirely different case. This is retail customers who  
22 were having retail accounts in a regular brokered account --

23 THE COURT: Wait, I'm not following the  
24 distinction. So, a financial institution that has  
25 shareholders and other stakeholders wouldn't pursue a valid

1 claim?

2 MR. HOFFMAN: I have no idea what their claims  
3 there, and I think to cast aspersions like the Trustee is  
4 here, to say that like, we can't defend ourselves without  
5 revealing the attorney/client privilege to suggest that oh,  
6 well, Cleary Gottlieb -- Cleary Gottlieb's other clients  
7 didn't pursue this, so why are you doing that? How are we  
8 supposed to defend that? The suggestion there is that Clary  
9 Gottlieb told my client he lost, right?

10 THE COURT: Well, respectfully, by the operation  
11 of the stipulation, that is what happened. And now, you  
12 have come up -- you are backing away from language that your  
13 clients agreed to, represented by predecessor counsel, and  
14 we haven't even gotten to three, which says: "The Trustee  
15 and the non-participating Claimants each agree not to  
16 distinguish the repo claims of the non-participating  
17 Claimants from the repo claims of the representative  
18 Claimants for purposes of any legal rulings made by the  
19 Bankruptcy Court or an Appellate Court in connection with  
20 with the litigation of any of the representative objections.  
21 Notwithstanding the foregoing, if and only if the Bankruptcy  
22 Court or an Appellate Court makes any legal rulings that  
23 distinguish among the repo claims of the representative  
24 Claimants that the upper Court had to have made a ruling  
25 that distinguishes among the repo claims of the

Page 24

1 representative Claimants," okay?

2 That's different -- slightly different provision  
3 than the last provision of Paragraph 2. Then: "each non-  
4 participating claimant shall not be restricted." So, under  
5 the clear words of Paragraph 3, your clients are not  
6 entitled to seek to distinguish its claim from the repo  
7 claims of the representative Claimants that were disposed of  
8 by the Second Circuit.

9 MR. HOFFMAN: Okay, so can I get to the issue of  
10 distinguishing?

11 THE COURT: Sure.

12 MR. HOFFMAN: Okay. That is clearly a reference  
13 to the stipulation of facts that the Trustee and the  
14 representative Claimants never produced. So how are we  
15 supposed to know --

16 THE COURT: Where does it say that? It doesn't --  
17 I just read the words. It does not reference a stipulation  
18 of facts.

19 MR. HOFFMAN: Okay, so how -- how is my client  
20 supposed to know what the facts of those claims are? The  
21 entire matter, largely, was filed under seal in this Court.  
22 I've never seen any of the deposition transcripts from the  
23 Trustee. There's never been any discovery given to my  
24 client. How is he supposed to know that his facts are not  
25 the same as the facts of --

1                   THE COURT: Okay, you know what we have, Mr.  
2 Hoffman? Here's what we have. What you're saying is that  
3 you believe -- you're arguing for a basis to be relieved of  
4 the agreement that your clients signed, because that's in  
5 essence what you're saying, because you're not denying now  
6 that the words mean what they say, but you're saying it  
7 really can't -- it can't have meant that because that  
8 wouldn't be fair or it can't have meant that because of a  
9 number of reasons. So I mean, it's basically like coming in  
10 after the fact and alleging something like fraud in the  
11 inducement or some basis on which to collaterally attack  
12 this document. But there isn't anything. There isn't  
13 anything. There was a ruling by the Second Circuit that  
14 said that repo claims, that by its terms, include the types  
15 of claims that your client holds, are not customer claims.

16                   MR. HOFFMAN: I think --

17                   THE COURT: And I -- and I -- look, I understand  
18 the distinction between an institutional investor and these  
19 are individuals. I understand that, and they lost money.  
20 But it -- things can't turn on that distinction, right?

21                   MR. HOFFMAN: I perfectly understand what you're  
22 saying, Your Honor, but let me --

23                   THE COURT: Go ahead.

24                   MR. HOFFMAN: -- let me get to the part where I  
25 think there is the actual distinction in the facts and I'll

1 -- I'll just be a second --

2 THE COURT: But how do I get past --

3 MR. HOFFMAN: Okay --

4 THE COURT: -- how do I allow you distinguish the  
5 claims of your clients when this binding stipulation says  
6 that you agree not to?

7 MR. HOFFMAN: Well, I would say, first of all,  
8 that the previous paragraph that says -- where the Second  
9 Circuit expressly makes the distinction --

10 THE COURT: No, but forget about that paragraph.

11 MR. HOFFMAN: Okay, well --

12 THE COURT: Pretend that paragraph doesn't exist.

13 MR. HOFFMAN: Okay, pretend that, all right.

14 THE COURT: Just Paragraph 3.

15 MR. HOFFMAN: All right, I would say this. Look,  
16 the other stipulation that's between the so-called  
17 representative Claimants and the Trustee was attached as an  
18 Exhibit to this order, to this stipulation order, and it was  
19 itself so ordered. In that order, the Trustee and the  
20 representative Claimants to produce this stipulation of  
21 facts, an agreed set of facts that they were going to  
22 litigate on, okay? And they never did that.

23 THE COURT: Okay, so if you were -- so then you  
24 would have expected Paragraph 3 to say, subject to the  
25 execution of that stipulation --

1 MR. HOFFMAN: It's not perfect.

2 THE COURT: -- we agree.

3 MR. HOFFMAN: I would have expected it to say a  
4 lot of other things if it says what the Trustee says it  
5 says, but it's not perfect, okay? But where is it going to  
6 come from? Where does that set of facts that we're going to  
7 distinguish ourselves from going to come from? And it's got  
8 to come from that stipulation, okay? That's the only source  
9 of it. The whole thing was filed under seal. They didn't  
10 allow us any discovery. How are we supposed to know what  
11 claims were really litigated and what weren't? How do I I  
12 know that there aren't facts in there somewhere --

13 THE COURT: Well, your clients chose to sign  
14 those. It was not predicated on the execution of a  
15 stipulation of undisputed facts.

16 MR. HOFFMAN: It was predicated on the stipulation  
17 that was an actual exhibit to this other second order. It  
18 was part of it as an exhibit. And they want to shut us down  
19 and they didn't dot all the Is and cross all the Ts, okay?  
20 I mean, maybe this was -- would be the most efficient way to  
21 have done it, maybe in retrospect the Trustee, you know,  
22 they didn't do what they were supposed to do, and if they're  
23 going to shut us down, take away everything and say you  
24 don't even have a right to be heard, I think they have to be  
25 taking care of every single detail.

1                   And one of those details, and it's not a small  
2 one, because I did include -- I showed you that Mr. -- one  
3 of the other counsel did, on behalf of the group, I was  
4 participating in the group on behalf of another Claimant at  
5 the time, sent that email to Ms. Hansa about -- that that  
6 was a major concern, the contents of this stipulation. Now,  
7 that the people from Cleary Gottlieb or wherever, I don't  
8 know what Cleary Gottlieb is so important -- you know, but  
9 did they screw up and not put the right language in there?  
10 I don't know if they did or not, but that thing was  
11 obviously the place where the thing to be distinguished from  
12 was going to come from.

13                   THE COURT: I have a stipulation that's clear on  
14 its face that was voluntarily signed by parties that were  
15 represented by sophisticated counsel, and now there's been  
16 an adverse ruling of the Second Circuit and what you're  
17 telling me is that it should have been drafted differently,  
18 it should have been drafted better, you're not bound, you  
19 want to just keep going, and that's just simply not the way  
20 it works.

21                   MR. HOFFMAN: I'm not saying that I'm not bound to  
22 the stipulation, or my clients aren't bound to the  
23 stipulation.

24                   THE COURT: You're absolutely saying that your  
25 clients aren't bound by the stipulation.

Page 29

1 MR. HOFFMAN: Okay --

2 THE COURT: That --

3 MR. HOFFMAN: -- in my view, I'm coming back to  
4 what I said, that Judge Peck himself said in the TBA case,  
5 is what a test case means, meaning we decide the case and  
6 you know, that's the rule of the case for the -- that's the  
7 law of the case for the other people but if you can  
8 distinguish yourself, that's it, and I think that that's  
9 where all this boils down to and gets us back so --

10 THE COURT: That's exactly right --

11 MR. HOFFMAN: Yeah.

12 THE COURT: -- except that in this case, you  
13 agreed that you weren't going to try to distinguish  
14 yourself. You absolutely correctly described the procedure  
15 of a test case, but here, your clients agreed to not seek to  
16 distinguish themselves. That's what they agreed to.

17 MR. HOFFMAN: Well, I'm just -- my point on that  
18 is that if there is any distinction to be made, a, I think  
19 that would be overruled by the Second Circuit thing. I  
20 understand the Court's point on this other point. However,  
21 that the distinguishing has to come from that stipulation of  
22 facts that the Trustee and the other guys, the  
23 representative people, never produced. They never did it.

24 THE COURT: And I will say --

25 MR. HOFFMAN: It was Court ordered, they have to

1 do it.

2 THE COURT: And I will say again that Paragraph 3  
3 doesn't say that, subject to the submission or the agreement  
4 on a stipulation of undisputed facts, comma, everyone agrees  
5 to this. That -- it doesn't say that. So, your view now is  
6 it should have said that, but it didn't say that and --

7 MR. HOFFMAN: Okay, not to -- and -- this will be  
8 the last time I'm going to say anything on this --

9 THE COURT: Okay.

10 MR. HOFFMAN: -- particular topic, but I do have  
11 some more things I'd like to say. But the other thing was  
12 part -- what I'm trying to convey is that the original  
13 stipulation that set up the representative Claimants was  
14 part of this stipulation. It's in this stipulation. It was  
15 an exhibit to it, and it itself is so ordered, and then this  
16 was so ordered with an exhibit to it, so it's in there.  
17 It's not some other separate document. It's part of this  
18 document.

19 THE COURT: Okay.

20 MR. HOFFMAN: Okay? That's the last thing I'm  
21 going to say about that.

22 THE COURT: Okay.

23 MR. HOFFMAN: Okay?

24 THE COURT: Yup.

25 MR. HOFFMAN: And I would just like -- okay, I

Page 31

1 will very quickly tell you why I think this case is -- might  
2 be a factual difference from the other cases.

3 THE COURT: Okay, sure.

4 MR. HOFFMAN: Okay? All the other cases were  
5 reverse repos in which -- and they were termed repos, so  
6 Doral or whoever, just to make it simple, has a bunch of  
7 securities, they go to -- they went to Lehman Brothers, they  
8 say, okay, I'll give you X amount today or \$100 million  
9 dollars in securities today, you give me \$90 million dollars  
10 or whatever the deal was and they say, okay, five years from  
11 now, we'll come back and we'll switch and you'll give me \$95  
12 million, I'll give you the securities back, whatever.

13 THE COURT: Right.

14 MR. HOFFMAN: That's more or less the case, right?  
15 And then --

16 THE COURT: Yup.

17 MR. HOFFMAN: -- then the Second Circuit said,  
18 look, in that five-year period of time, Lehman Brothers has  
19 no obligation to hold those securities for you, to do  
20 anything, whatever, it's a contract. Years later you come  
21 back and you know, if they fail to do whatever on that  
22 contract then that's just a -- you're just out of luck,  
23 right? They have some obligation to make you payments that  
24 are equal to the interest or the coupons on the bonds and so  
25 forth, but they're not really actually -- they don't even

1 have to hold the buckets, right? That's -- can we agree  
2 that that's more or less what the case -- what the case  
3 said? And it said, look, that doesn't make you a repo.  
4 That doesn't make you a customer because they have no  
5 obligation to hold those securities for you, right? That's  
6 the case.

7 THE COURT: I -- you --

8 MR. HOFFMAN: Okay.

9 THE COURT: I get to ask the questions, not you,  
10 so.

11 MR. HOFFMAN: Okay. I just want to make sure I'm  
12 not going too far away from the Court's --

13 THE COURT: I say okay in the sense that I hear  
14 you and I'm listening to you.

15 MR. HOFFMAN: Okay, you hear, me, all right.

16 THE COURT: Okay?

17 MR. HOFFMAN: In this case, the securities were  
18 not, okay, and I'm 95 -- that's why I need a little  
19 discovery so I'm asking for it, I know you're probably not -  
20 - I'm not -- probably not going to get it, but I want to  
21 tell you why I need it. Because what they were doing, they  
22 were doing some options trading on the bonds and then at  
23 certain times, they would be owning bonds to cover the  
24 options, okay? Now, what the repo was, the way the bonds  
25 were held in their account were as the proceeds of a -- they

1       were the buyers. They were in the situation of Lehman  
2       Brothers in the other case, in the cases that went to the  
3       Second Circuit, okay? They were the buyers, that's what the  
4       confirmations say. Now, they bought them with a lot of  
5       margin, so Lehman Brothers isn't going to let you go, it's a  
6       million dollars. It was \$900,000 or so on margin that each  
7       was purchased with, it says they're margin accounts, so  
8       that, unlike Lehman Brothers in the Second Circuit case,  
9       they could walk away and settle all the bonds and stuff, my  
10       clients couldn't do that. Even though they owned them, they  
11       owned them subject to their margin lead, okay?

12                   THE COURT: Mm hmm.

13                   MR. HOFFMAN: And they were sitting in their  
14       account in some sort of custodial capacity. That is  
15       covered, by the way, by the master agreement about when you  
16       have proceeds but you leave them in there. I mean, they're  
17       people, they don't have their own -- all these fancy DDP  
18       acts and so forth, they leave them in there, and that's what  
19       I'm talking about. That's what I think the difference is  
20       between us and them. We're not saying that a repo created  
21       the customer status. We're saying that those bonds sitting  
22       in the account that were purchased creates the -- those  
23       should have been -- those are entrusted by the brokerage,  
24       okay? Not something that's actual -- not something that  
25       we're giving, we're taking, you know, like the other guy.

1 It's like, it's completely arm's length, they shake hands,  
2 see you in five years. No, they -- LBI was holding my  
3 client's property, my client and several clients' property  
4 in each of the accounts because they were the purchasers  
5 under the repo agreements. Okay? And that's why I think  
6 that is -- that's true.

7 And as far as all this goes, Mr. Salzman and the  
8 Trustee have made a lot of threats, I think is fair to call  
9 them, about this --

10 THE COURT: No, I don't think it's fair to call  
11 them threats. I think that -- that what you have is a  
12 situation where you have the largest, most complex case of  
13 this kind and a Trustee who's trying to do his level best to  
14 get rulings and affect an orderly liquidation to return  
15 distributions to folks just like your clients. So, in order  
16 to do that, it's necessary to lay down certain rules of the  
17 road, to set up economies of scale, et cetera. Not at the  
18 expense of anybody's due process rights, but in order to  
19 avoid, seriatim, people coming back and saying -- and  
20 seeking to distinguish themselves, and -- otherwise it would  
21 go on forever.

22 As it is now, you can pick up the newspaper -- I  
23 guess people don't pick up the newspaper anymore, but you  
24 can look at articles that say, you know, why is Lehman  
25 Brothers still going when it's seven, eight years after the

1 fact? And this is one of those situations where you're  
2 saying the Trustee is threatening. The Trustee I think, in  
3 good faith, and you, in good faith, representing your  
4 clients, are trying to do, you know, trying to get a result.  
5 The problem that I have is that by the plain reading of the  
6 stipulation, your clients are precluded from doing what  
7 you're doing now. That's essentially what it comes down to  
8 and you know, I think what you're saying is that, you know,  
9 Cleary Gottlieb should have done a better job, should have  
10 done a different job, but the words on this page are very  
11 clear and I think, you know, to the lawyers' credit, they  
12 kept it simple, and applying the simple words, I think you  
13 get to a result that your clients are bound. But I'd like  
14 to give Mr. Salzman an opportunity, just hypothetically, to  
15 respond to your argument that factually distinguishes your  
16 client's situation from those that were passed on by the  
17 Second Circuit.

18 MR. HOFFMAN: Thank you.

19 THE COURT: All right? Thank you.

20 MR. SALZMAN: Thank you, Your Honor.

21 THE COURT: Sure.

22 MR. SALZMAN: I'm Michael Salzman from Hughes  
23 Hubbard & Reed on behalf of the LBI Trustee.

24 I don't hold any brief for Cleary Gottlieb. They  
25 did fine by themselves, but I would say that in this case,

1       they knew what they were doing. This was not a mistake on  
2       their part. It is correct that these folks, the Katz  
3       Claimants, were subject to master repurchase agreements in a  
4       form that was the same as the ones that were litigated and  
5       the same that the other people who were stipulated agreed  
6       to.

7               It was clear from the briefing that the case  
8       essentially arose -- rose or fell on whether the Second  
9       Circuit would accept the ruling from the District of New  
10      Jersey in the Bevill, Bresler case and had it done so, we  
11      would have had a different outcome, but plainly, that didn't  
12      happen, and the stipulation did cut both ways.

13               If the Second Circuit had ruled in the opposite  
14      direction, we would not have been able to stand up here  
15      today and say, but the Katz Claimants are different, that  
16      was a reverse repo, these folks, the Katz people had  
17      straight repos not reverse repos, that was for institutions,  
18      these are individual -- we wouldn't have been able to do any  
19      of that either. We would have had to accept the ruling and  
20      that was a calculation that the Katz's attorney was entitled  
21      to make and did make.

22               So, next, I would just say briefly that there was  
23      no secret record. There was parts that were sealed, but  
24      there was plenty of briefing. All the briefing was public,  
25      there were 40 pages of facts described, so this wasn't done

1 in the dark.

2                   Further, I would say that the scheduling  
3 stipulation to which Mr. Hoffman referred only said, and it  
4 was just a scheduling stipulation, that we would endeavor to  
5 stipulate. Nothing was conditioned on actually having a  
6 stipulation of facts. As in many cases, it proved a waste  
7 of time, eventually, and the lawyers on both sides concluded  
8 it was better just to proceed on the record. Even if we had  
9 had a stipulation, it might have just not been a full  
10 stipulation anyway, and the Cleary people understood that.

11                   On the merits, the fact is that these folks got  
12 their property back from Lehman because all their accounts  
13 were transferred to Barclays, and so whatever was in their  
14 account, including securities, was transferred to Barclays.  
15 These Katz Claimants circled the N box, the No box, no we  
16 are not claiming for securities.

17                   In Paragraph 6 of the limited objection to the  
18 Trustee's determination the Cleary filed on behalf of these  
19 three sets of Claimants, they said that their damages, that  
20 their claim for customer status was about the valuation  
21 damage caused by the failure of Lehman to complete the  
22 second leg of the repo transaction. The difference between  
23 the purchase price Lehman would have had to pay, or was  
24 obligated to pay, for the securities (indiscernible).

25                   THE COURT: So what you're describing is different

Page 38

1 from what Mr. Hoffman described to me moments ago. He was  
2 describing cash that was essentially captive in their  
3 accounts.

4 MR. SALZMAN: There was no cash captive in their  
5 account. The account transferred to Barclays. Paragraph 6  
6 -- I'm repeating -- Paragraph 6 of the limited objection  
7 filed on behalf of each of these three sets of Katz  
8 Claimants says that their claim is based upon the difference  
9 in price between the contract price and the valuation of the  
10 securities.

11 And that's why, even though their claim -- their  
12 accounts had, I'll say more than \$10 million dollars in  
13 them, they're not claiming anything like that. They're  
14 claiming the difference in value between the two prices, the  
15 closeout price and the contract price.

16 And so, on the merits, I think the Court can be  
17 completely confident that these people have a contract claim  
18 just like Judge Peck ruled at the beginning of the test  
19 case, these are essentially contract claims, or they are  
20 contract claims, and that was the rationale all the way up  
21 to the Second Circuit. They're contract claims. They're  
22 not customer claims. Thank you, Your Honor.

23 THE COURT: Okay. All right, thank you. Mr.  
24 Hoffman, would you like a brief opportunity for rebuttal?

25 MR. HOFFMAN: Just very briefly, Your Honor. I

1 don't think -- I think you can look at the exhibits and see  
2 that -- I don't think Mr. Salzman is correct. There were  
3 securities -- if you look on Exhibit 7 -- exhibit -- I think  
4 it's 5, 6, and 7, it says "Margin Account," it shows  
5 securities, it says my client bought the securities. You  
6 can look at those --

7 THE COURT: But you're not asking for the return  
8 of any securities.

9 MR. HOFFMAN: Well, they have -- okay. As far as  
10 checking those boxes goes, if that is not the basis of the  
11 Trustee's motion here, if they're trying to expunge us for  
12 some other reason, that -- whether or not they checked this  
13 box or that box when they filed their claims or -- I mean,  
14 they did not do that through counsel and my understanding is  
15 Cleary Gottlieb, who we've all seemed to defer to today,  
16 didn't update that, so I don't know exactly what the  
17 significance of that --

18 THE COURT: I'm sorry, are you disagreeing with  
19 the way that Mr. Salzman characterized and described the  
20 nature of your client's claims?

21 MR. HOFFMAN: The nature of my clients claims are  
22 that they had securities that they had purchased, purchased  
23 under repurchase agreements, but they had purchased and they  
24 were their property, just like the Second Circuit said, that  
25 they're the property of the guy buying them in the thing

Page 40

1 until it gets reversed. Now, Lehman Brothers may have had  
2 an obligation to buy those back at a certain price, and if  
3 that's the -- you know, if the arithmetic comes out safe,  
4 it's not for the -- you know -- we weren't going to be  
5 getting these securities because they were all subject to  
6 margin allowance and so forth.

7 THE COURT: Okay. All right.

8 MR. HOFFMAN: But if I just may be heard but --  
9 just for --

10 THE COURT: Mm hmm.

11 MR. HOFFMAN: -- ten seconds, thirty seconds, is  
12 that look, we're answering a motion here, okay? And I don't  
13 know, you know, Mr. Salzman has made a -- in his papers,  
14 suggesting -- I've never heard of anybody being sanctioned  
15 for answering a motion. It's their motion, you know, and  
16 the stipulation order is subject to judicial review. If the  
17 Court is going to pass on it and make its ruling then  
18 there's nothing that could immunize that from being, you  
19 know, looked at by a Court.

20 THE COURT: Of course now.

21 MR. HOFFMAN: Okay. Thank you very much.

22 THE COURT: Of course not. Okay, thank you. We  
23 will take it under submission.

24 MR. SALZMAN: Thank you, Your Honor.

25 THE COURT: All right, thank you.

1 MR. MARGOLIN: Your Honor.

2 THE COURT: Yes.

3 MR. MARGOLIN: That completes the LBI course in  
4 the calendar. Can the LBI team be excused?

5 THE COURT: Yes, thank you very much.

6 MR. MARGOLIN: Thank you.

7 THE COURT: Hello, Ms. Marcus.

8 MS. MARCUS: Good morning, Your Honor. Jacqueline  
9 Marcus, Weil Gotshal & Manges on behalf of Lehman Brothers  
10 Holdings, Inc. as plan administrator -- or on behalf of LBHI  
11 and its affiliated Debtors. Your Honor, the first matter on  
12 the docket today for LBHI is a status conference regarding  
13 the amended omnibus application of certain individual  
14 Committee members for payment of fees and reimbursement of  
15 expenses.

16 As you may know, Your Honor, the plan  
17 administrator has not taken a position regarding this  
18 matter, so I defer to the Office of the U.S. Trustee, Ms.  
19 Schwartz or anybody else who wants to be heard.

20 THE COURT: All right, so, it's been a while since  
21 we were all together, and it looks like, on December 18th,  
22 there was filed something styled "Amended application of  
23 certain individual Committee members for payment of fees and  
24 reimbursement of expenses," a long pleading that had various  
25 declarations attached to it. So that's all I know.

1 MS. COFFINO: So why don't I give you an update?

2 THE COURT: Thank you, Ms. Coffino.

3 MS. COFFINO: May I approach the mic?

4 THE COURT: Yes.

5 MS. COFFINO: When we were last before you, it was  
6 a long time ago, I realize that, you recognized that it --  
7 what you'd asked us to do, which is basically pull apart our  
8 time records and take out fees and time that was not --

9 THE COURT: Extraordinary.

10 MS. COFFINO: -- strong enough to be a substantial  
11 contribution, that was more normal.

12 THE COURT: I mean just -- right, just a level  
13 set, right? We had -- the case went up to Judge Sullivan --

14 MS. COFFINO: That's correct.

15 THE COURT: -- he reversed, and said that he  
16 rejected the United States Trustee's position, which was a  
17 categorical bar on these seeking reimbursement from the  
18 estate for these types of fees, correct?

19 MS. SCHWARTZ: Your Honor, that's not correct.

20 So, when it's appropriate for me to clarify that, I will do  
21 that.

22 THE COURT: Okay. Well, he -- let me -- maybe I  
23 misspoke. He said that under certain circumstances,  
24 Committee members could make an application for  
25 reimbursement of their individual counsel fees under a

1 substantial contribution standard.

2 MS. SCHWARTZ: Your Honor, if you would just bear  
3 with me --

4 THE COURT: Yeah.

5 MS. SCHWARTZ: -- what Judge Sullivan actually  
6 said, which he perceived the other side, understanding our  
7 position to be that a Creditor Committee member under no  
8 circumstances --

9 THE COURT: No circumstances.

10 MS. SCHWARTZ: -- could ever --

11 THE COURT: That's what I just said.

12 MS. SCHWARTZ: No, no, but I -- you didn't let me  
13 finish, because when they went further for the application  
14 for direct certification to the Second Circuit, the United  
15 States Trustee counsel clarified to Judge Sullivan that that  
16 was not our position and that our position was that a --  
17 just because a Creditor sits on a Creditors' Committee does  
18 not bar them from making an application as a Creditor in  
19 wearing its Creditor hat, not as a Creditor seeking  
20 substantial contribution for the work that the Creditor does  
21 as part of its duties as a Creditor Committee member. What  
22 Judge Sullivan said at that hearing, which I brought a copy  
23 of the transcript and a copy of the decision for Your Honor,  
24 he made it very clear. He said that he perceived, based on  
25 the Appellee's briefs, that they perceived he was setting a

1 new standard for substantial contribution claims when in  
2 fact he was not doing that at all. And in fact, what he  
3 said was, he was merely restating the standard, and why this  
4 means something, Your Honor --

5 THE COURT: I have to tell you, I don't -- I am  
6 not following at all what you're saying.

7 MS. SCHWARTZ: Okay, well let me try this --

8 THE COURT: All I know is what I read in Judge  
9 Sullivan's opinion.

10 MS. SCHWARTZ: In that one opinion, not in the  
11 subsequent opinion on the motion for the direct cert to the  
12 circuit, which I have brought copies for you, Your Honor.

13 THE COURT: Okay, keep going.

14 MS. SCHWARTZ: But the point is -- but the point  
15 is, he had perceived us, based on what the arguments were at  
16 that particular hearing, as taking the position that under  
17 no circumstances could a Creditor Committee member ever file  
18 a motion for a substantial contribution and he rejected  
19 that.

20 THE COURT: But -- I'm sorry, in his original  
21 opinion, which is the only thing that I've seen, I've -- my  
22 recollection is that he explicitly states what the U.S.  
23 Trustee's position was and he rejects it. He rejects, in  
24 the opinion, the U.S. Trustee's argument, or his --

25 MS. SCHWARTZ: Perception.

1                   THE COURT: -- perception of the argument that  
2 your office's position was that there was a categorical bar.

3                   MS. SCHWARTZ: Correct. And at the hearing, on  
4 the application that the Creditors took to go right to the  
5 Circuit to appeal the 1129(a)(4) issue, we clarified that  
6 for Judge Sullivan, stating clearly on the record that we  
7 had never argued that in our papers.

8                   THE COURT: Okay. So was -- is he --

9                   MS. SCHWARTZ: It was a misperception.

10                  THE COURT: Okay, so now, is the upshot of all of  
11 that, which, just to be clear --

12                  MS. SCHWARTZ: Yes.

13                  THE COURT: -- this is the first I'm hearing of  
14 it.

15                  MS. SCHWARTZ: I understand that, Your Honor.

16                  THE COURT: SO is the upshot of that, that as we  
17 go forward to resolve this now, and hypothetically, I were  
18 to grant a substantial contribution claim for -- I'm going  
19 to make up a number that's not on -- a million dollars in  
20 the aggregate, say a million dollars, that -- and then there  
21 were an appeal -- well, question. If the applicants chose  
22 to appeal, they would choose to appeal. But would your  
23 office be pursuing an appeal based on the argument that  
24 there's a categorical bar?

25                  MS. SCHWARTZ: Absolutely not.

1                   THE COURT: Okay, so we are -- so we are engaged  
2 now on the issue of fulfilling what Judge Sullivan actually  
3 said in his original opinion, which was the entitlement to a  
4 substantial contribution claim for extraordinary work, work  
5 above and beyond what a normal Committee would do.

6                   MS. SCHWARTZ: Well --

7                   MS. COFFINO: May I -- I would just like to  
8 address one thing.

9                   THE COURT: Ms. Coffino, I apologize. I didn't  
10 mean to deprive you of your chance to speak, but this is a  
11 helpful clarification.

12                  MS. COFFINO: Yeah, no, I agree. Just a  
13 clarification. Your Honor, he did not -- what he said was,  
14 just because a Creditor sits on a Creditors' Committee does  
15 not bar that Creditor from seeking a substantial  
16 contribution under the existing case law and standard, not a  
17 new standard that --

18                  THE COURT: I --

19                  MS. COFFINO: -- wait, it's important, though,  
20 Your Honor, because at that hearing where they went to the -  
21 - for the certification, Judge Sullivan stated on the  
22 transcript, which, it's on the docket, he stated he believed  
23 that based on the other side's papers, they perceived that  
24 he had made a new standard, that there was a standard called  
25 above and beyond extraordinary services. But what he was

1 really saying and citing to Dana, Bayou, all the existing  
2 cases, is that in order for the Creditors in this case, who  
3 have been paid to date in the aggregate, \$30 billion  
4 dollars, in order for them to sustain a substantial  
5 contribution claim, they have to satisfy the existing  
6 elements, which Your Honor is familiar with. Actual and  
7 necessary benefit, direct, demonstrable benefit not just for  
8 them but for the --

9 THE COURT: Okay, but the operative quote from his  
10 opinion, okay, and you know, this creates a quirky --

11 MS. COFFINO: Yes, it does, Your Honor.

12 THE COURT: -- this creates a quirky situation for  
13 me to deal with because I have his opinion and --

14 MS. COFFINO: Right.

15 THE COURT: -- that's what I need to try to comply  
16 with.

17 MS. COFFINO: You also have to look at his  
18 subsequent opinion, though, where he speaks to that.

19 THE COURT: Well, the -- the operative language  
20 from his first opinion was, "To the extent official  
21 Committee members performed extraordinary work to benefit  
22 the estate, above and beyond normal Committee duties, they  
23 may, as will be explained below, seek to be reimbursed under  
24 503(b)(3)(d) and (b)(4). So --

25 MS. SCHWARTZ: Right.

1                   THE COURT: The way I'm reading that, and I don't  
2 think it's changed by what you're saying, I have yet to read  
3 -- let me finish --

4                   MS. COFFINO: Yeah.

5                   THE COURT: -- is to the Committee members, don't  
6 ask for normal Committee fees. Don't ask for that. Right?  
7 Above and beyond normal Committee --

8                   MS. COFFINO: Right.

9                   THE COURT: -- don't ask for that. Then we get  
10 to, well, what can you ask for?

11                  MS. COFFINO: Right.

12                  THE COURT: And what you're saying is that 503(b),  
13 the normal showing applies.

14                  MS. COFFINO: Correct.

15                  THE COURT: Okay.

16                  MS. SCHWARTZ: And what I'm also saying, Your  
17 Honor, so I'm very clear, because I don't want this -- you  
18 know, I think we come to you in a very good positon. We've  
19 had discussions, Ms. Coffino will talk to you about our  
20 discussions and agree to a discovery schedule, all this good  
21 stuff that's coming to you. But so that it's not a surprise  
22 to you, when we file our response, our view is, Your Honor,  
23 that all of those Creditors can file a substantial  
24 contribution motion for services they provided as a Creditor  
25 to the estate based on the existing standard wearing their

1 individual Creditor hat, but not the fact that, for example,  
2 they participated in 160 meetings to go to a --

3 THE COURT: Well, I want to go back to the  
4 statement that you made that we're in a good place, because  
5 --

6 MS. SCHWARTZ: Right.

7 THE COURT: -- from what you just said, it doesn't  
8 sound like a place I want to be, okay?

9 MS. SCHWARTZ: Okay, fair enough.

10 THE COURT: So let me -- why don't you have a seat  
11 --

12 MS. SCHWARTZ: Yes.

13 THE COURT: -- and let me -- let's have Ms.  
14 Coffino resume.

15 MS. COFFINO: Let me just address this issue first  
16 because we've been wrestling with it since the beginning the  
17 first time we were here before you when we said we had a  
18 threshold legal issue.

19 THE COURT: Speak up, if you would, Ms. Coffino.

20 MS. COFFINO: I'm sorry. You know, this -- every  
21 Committee member is a Creditor. Everyone that sits on a  
22 Committee is a Creditor, so I think that --

23 THE COURT: That's a good thing.

24 MS. COFFINO: But the -- the -- I think what the  
25 Trustee -- U.S. Trustee is distinguishing between is work

1 done qua Committee member, while you're on the Committee,  
2 actual Committee work, and work does as an individual  
3 Creditor totally outside the Committee's role. And we read  
4 Judge Sullivan's decision, and we don't think is subsequent  
5 conclusion that the standard is the same, the elements are  
6 the same, changes that, that you can get a substantial  
7 contribution as a Committee member for Committee work if you  
8 perform extraordinary work over and above the normal duties  
9 of the Committee. We just spent 11 months pulling apart our  
10 time records for that reason.

11 THE COURT: You see, so I don't -- so you are --  
12 you are very far apart on what your view of what the law  
13 actually is now, because -- go ahead, Ms. Coffino.

14 MS. COFFINO: But we -- I mean, that is a legal  
15 issue. I'm sure that the U.S. Trustee will brief that issue  
16 at the appropriate time, but as far as proceedings going  
17 ahead on a factual basis, I think we are very close. We  
18 have an issue, one issue that --

19 THE COURT: Well, what does that mean? You --  
20 what -- first of all, what are the total fees that are now  
21 being requested by the applicants?

22 MS. COFFINO: I think we shaved \$7 million dollars  
23 off of it, so somewhere around \$19 million dollars. It was  
24 \$26-, it's now \$19-.

25 THE COURT: And are you, without revealing

Page 51

1 anything that would be in the nature of settlement  
2 discussions, are you engaged with the office of the U.S.  
3 Trustee on -- on arriving at a number that would result in a  
4 consensual order or are we embarking on a litigation path?

5 MS. COFFINO: No, we are embarking on a  
6 litigation, Your Honor. There hasn't been settlement  
7 discussions. I think this issue precludes a settlement  
8 discussion.

9 THE COURT: But see, that -- that's exactly where  
10 I started with my question to determine what we're doing,  
11 because we're -- we are now in a situation where, because  
12 the difference in opinion about what the legal standard is,  
13 okay, this isn't going to end anytime soon because if I make  
14 a -- if I make a ruling after a litigation and I go about an  
15 analysis of what qualifies for reimbursement as a  
16 substantial contribution, unless I adopt the qua Creditor  
17 view as opposed to the qua Committee member view.

18 Then we're going to -- we're going to keep going  
19 because there's going to be a continuing appeal, and I find  
20 it very problematic procedurally to take a decision and then  
21 -- and this is -- I'm very aware that there will be a  
22 transcript of this, this is not at all a criticism of Judge  
23 Sullivan, whose opinion I thought was crystal clear and I  
24 stood and stand ready, as I have to, on the remand to apply  
25 it. But now, I have what I would call a muddying of what I

Page 52

1 had thought were clear -- clearer waters. So -- and I'll  
2 make it very clear that I think it's a waste of everyone's  
3 resources to have an extended litigation over this. I find  
4 it very problematic.

5 MS. SCHWARTZ: Your Honor, can I just address that  
6 because I think -- I think I would address your issue on  
7 resources. First of all, as far as an appeal is concerned,  
8 in the Creditors' papers, Your Honor would have seen that  
9 they intend to go, take an appeal, after you rule because  
10 they're going to appeal that 1129(a)(4) issue no matter what  
11 happens here, and they put that in their papers. So as far  
12 as an appeal is concerned, they've already advised the  
13 Court, that's what they're doing. So that's one component  
14 part. I want to just be clear about that.

15 With respect to why he's --

16 THE COURT: So let me understand this. If I,  
17 after a trial or a lack of objection by the U.S. Trustee, if  
18 I were to enter an order granting the relief you request,  
19 pursuant to a revised application, you're going to appeal?

20 MS. COFFINO: No --

21 THE COURT: You're going to appeal from an order  
22 granting --

23 MS. COFFINO: -- we reserve our right to appeal  
24 the 1129(a)(4) issue. For our part, Your Honor, we tried to  
25 avoid all this.

1 THE COURT: Didn't that ship already sail?

2 MS. COFFINO: No, we asked -- we asked if it was  
3 an interlocutory order. We asked for the Judge to certify  
4 it to the Second Circuit so we could avoid this very  
5 circumstance that we're in now, and he refused to do it, so  
6 we're back here. We had no choice. We thought we should be

7 --

8 THE COURT: So I'm going to go through,  
9 potentially, a long, contested trial going through thousands  
10 of pages of time records, applying, potentially, two  
11 different standards, and then, no matter what I do, there's  
12 going to be an appeal?

13 MS. COFFINO: That's -- on the 1129(a)(4) issue, I  
14 believe that's right. Unless there's some form of  
15 settlement, yes.

16 MS. SCHWARTZ: That is --

17 MS. COFFINO: We tried to avoid it.

18 MS. SCHWARTZ: -- exactly what they say in their  
19 papers, and the money that they say that they've taken --

20 THE COURT: You can avoid it. You can just not do  
21 it.

22 MS. COFFINO: Your Honor, with the -- anyone can  
23 give up their rights.

24 MS. SCHWARTZ: Your Honor, that \$7 million that  
25 they say they've shaved off, that's -- they're going to seek

1 that for their appeal. That's all reserved for their  
2 appeal. So -- but let's talk about positive things for a  
3 moment, if we can, try to shift it back a little bit,  
4 because there are some.

5 THE COURT: The sun's out today.

6 (Laughter)

7 MS. SCHWARTZ: But there are some.

8 THE COURT: It's not raining.

9 MS. SCHWARTZ: But there really are some. There  
10 really are some. Okay. Your Honor, we -- since they've  
11 filed their papers, we've had a bunch of discussions with  
12 the Creditors. There hasn't been radio silence or anything  
13 like that. We've exchanged discovery schedules, we've  
14 resolved how to get by certain discovery issues that we had.  
15 With respect to some of the issues, Your Honor, we're  
16 willing, if the other side is willing, if they want to --  
17 we're going to talk because we'll have a 26(f) conference  
18 with them next week, but we're willing, if they're willing  
19 to stipulate to certain things, that's going to narrow  
20 discovery. But let me just point out a few things because I  
21 think this is very important --

22 THE COURT: But do you hear the words that you're  
23 saying, Ms. Schwartz? The words that you're saying are  
24 discovery. It's May of 2016, so we're talking about  
25 discovery of what these folks and their counsel did seven,

1       eight, six, five years ago. It's absurd.

2                   MS. SCHWARTZ: Not really because, let me say  
3       this, if you read the services that they assert that qualify  
4       for the substantial contribution claim, for example, serving  
5       as a parallel management team when Alvarez and Marsal was  
6       the management team for the Debtors and was paid over \$600  
7       million dollars for that service, it's not absurd to be able  
8       to take discovery because the law says that a substantial  
9       contribution claim is to be narrowly construed to not  
10      mushroom the administrative expenses.

11                  THE COURT: So that one, as an example, for that  
12      one, it really wouldn't matter whether it's qua Committee or  
13      qua Creditor because you would say --

14                  MS. SCHWARTZ: It's duplicated and it wouldn't  
15      make the standard.

16                  THE COURT: -- you would say no way, no how, no  
17      matter what.

18                  MS. SCHWARTZ: Correct, and that's what I'm trying  
19      to say to you, Your Honor, that that qua -- the way you said  
20      it very elegantly, qua Committee, qua individual --

21                  THE COURT: That was -- I stole it from Ms.  
22      Coffino.

23                  MS. SCHWARTZ: Okay, Ms. Coffino. But that's just  
24      one issue. Your Honor, they say that they worked really,  
25      really hard. Well, the case law says that just because you

1 had extensive participation, you don't necessarily get a  
2 substantial contribution claim.

3 Importantly, Your Honor, what the case law says is  
4 that when you have retained professionals, and in this case,  
5 the Committee had no bank, (indiscernible) --

6 THE COURT: Okay, Ms. Schwartz, I appreciate that  
7 if I said to you right now give me a closing argument, you  
8 could, okay, but I'm not going to do that today.

9 MS. SCHWARTZ: But the point is this --

10 THE COURT: I understand -- I understand the point.  
11 Let me ask a different question of Ms. Marcus.

12 MS. COFFINO: Sure. Thank you, Your Honor.

13 THE COURT: So, you indicated that, as if this  
14 point you're, you know, agnostic a bystander. Is it the  
15 plan administrator's intent to remain on the sidelines?

16 MS. MARCUS: Well, Your Honor, yesterday, or I  
17 guess late last week when I spoke to Ms. Schwartz was the  
18 first that we've heard about the new discovery initiative  
19 and frankly, it's very troubling to us because on the one  
20 hand, we want to stay on the sidelines. On the other hand,  
21 any discovery will necessarily involve the Debtor's  
22 participation, I believe.

23 THE COURT: Well, let me ask about the sideline  
24 concept, because if this were a normal case, and -- or a  
25 regular big case, for example, a substantial contribution

Page 57

1 application would be made as part of the claims process, and  
2 the Debtor in the first instance, the reorganized Debtor,  
3 would respond to the application. Right?

4 MS. MARCUS: Yes.

5 THE COURT: Okay. So -- and that's because the  
6 Debtor has a -- reorganized Debtor has a stake in not paying  
7 out admin expense money, right?

8 MS. MARCUS: Correct.

9 THE COURT: Okay. So, it is at least  
10 theoretically possible that the plan administrator could  
11 look at all this and, well, in a more routine 503(b)  
12 application, you might say yeah, I think you played an  
13 important role in the case. It's not worth \$10 million  
14 dollars, it's worth a million dollars. And it could be  
15 settled on that basis.

16 MS. MARCUS: Correct.

17 THE COURT: Correct?

18 MS. MARCUS: Yes, but my understanding is that  
19 even if, and we haven't engaged in settlement discussions,  
20 but even if we did engage in settlement discussions with the  
21 Committee representatives, we would also have to get the  
22 office of the U.S. Trustee on board because they've  
23 obviously taken a much greater role in this dispute than we  
24 have. So it would be a three-way discussion.

25 THE COURT: Sure. It would be a three-way

Page 58

1 discussion, but if there were to be a consensual resolution,  
2 like any consensual resolution, someone could object.

3 MS. SCHWARTZ: I think it's also not the normal  
4 situation, Your Honor, because the Debtor had agreed to that  
5 permissive plan provision. So you see, from the outset, the  
6 Debtor was willing to pay them. They were willing to pay  
7 them as a plan provision.

8 THE COURT: Okay, but the Debtor stands corrected  
9 by Judge Sullivan and everyone --

10 MS. SCHWARTZ: Well, I just don't see their  
11 incentive to play a large role in now what the Creditors try  
12 to make a substantial contribution claim when initially,  
13 they were like -- it's only -- remember, Your Honor, this is  
14 a big case, right? So the Debtor --

15 THE COURT: Yeah.

16 MS. SCHWARTZ: -- when they were coming up with  
17 the consensual resolution, although we don't know this but  
18 we'll inquire and we'll find out, \$26 million and Andrea  
19 Schwartz as an individual doesn't believe this, but in the  
20 context of this case, it's a drop in the bucket.

21 THE COURT: I understand, but my point is that now  
22 -- okay --

23 MS. COFFINO: May I speak?

24 THE COURT: All right --

25 MS. MARCUS: Can I say one more thing, Your Honor?

1 Where we are very concerned that the discovery that the  
2 parties are talking about now is going to consume more than  
3 -- not more than but consume quite a lot of estate assets.  
4 We've wound down the estate, there are much fewer employees  
5 at the estate, and the last thing we want is to spend all  
6 the money on discovery.

7 THE COURT: Okay. All right. Okay, so go ahead,  
8 Ms. Coffino.

9 MS. COFFINO: Just by way of background, the  
10 original application had two legal theories, 1129(a)(4) in  
11 the plan provision, 503(b). The Debtor did submit -- the  
12 CEO submitted a declaration in support of that and said we  
13 had made a contribution in his view. That said, for our  
14 part, we're happy to sit down with anyone. We have -- you  
15 know, we're not looking forward to six months of intensive  
16 discovery here.

17 We tried to avoid it by going directly to the  
18 Second Circuit. But we're happy to talk to the Debtor and  
19 we're happy to talk to the U.S. Trustee about a settlement.  
20 If they're willing to (indiscernible)

21 THE COURT: But that's inconsistent with the  
22 notion that even if I were to grant your application in the  
23 full amount, you're going to appeal.

24 MS. COFFINO: But we could avoid the 503(b), you  
25 know, proceeding. It's a legal -- it's just an appeal,

1 legal documents. It's not six months of discovery and  
2 depositions.

3 THE COURT: Okay, so what's your idea of what  
4 should happen next?

5 MS. COFFINO: Well, as Ms. Schwartz was telling  
6 you, we have had very productive sections in working out a  
7 scheduling order. We had one stumbling block. We wanted  
8 the UST to file a response, and other parties, wanted to set  
9 a deadline for responses so that we knew who -- what  
10 positions people were taking before discovery started. They  
11 didn't want to do that. This morning, they have offered to  
12 file a response by July 17th, and we can live with that, and  
13 there's some -- you know, the overall discovery schedule, we  
14 -- the timing I think we're in agreement on. There may be  
15 some nuances for internal deadlines that we need to work  
16 out. I think we're so close that we'll get there. I do  
17 believe that the U.S. Trustee also feels that way and that  
18 we'd be ready to submit a scheduling order to you.

19 MS. SCHWARTZ: And like I said, Your Honor --

20 THE COURT: But we're going to have to have a  
21 trial.

22 MS. COFFINO: Yes, I think so, unless --

23 MS. SCHWARTZ: Unless the Creditors decide that  
24 they're going to waive their substantial contribution claim  
25 and just take their appeal in 1129(a)(4) because -- because

1 Judge Sullivan said, hey, I can't certify it and besides,  
2 it's got to go back to Bankruptcy Court, you know, if they  
3 waive their substantial contribution claim and just take  
4 their 1129(a)(4) to the Circuit, you avoid the discovery at  
5 the bankruptcy level.

6 MS. COFFINO: Well, waiving our rights, Your  
7 Honor, we're happy to sit down with anyone and talk about an  
8 amicable resolution.

9 THE COURT: Okay.

10 MS. COFFINO: And we --

11 MS. SCHWARTZ: And I will say, Your Honor, we have  
12 -- we really have tried and we, the parties, we're -- I  
13 think we're in a pretty good state in terms of that. I was  
14 the one who called Ms. Marcus to come today, to this  
15 hearing. I also called Committee counsel, Mr. O'Donnell is  
16 here, sitting in the back, because I thought that, to the  
17 extent we're going to be entering a discovery schedule and  
18 that this was on the docket, they should be aware of it. I  
19 thought as a matter of courtesy that they should be here.  
20 And I will say that we're going to have a 26(f) conference.  
21 I really, truly believe, Your Honor, that there's going to  
22 be a narrowing of issues, based on my conferences that I've  
23 had with the other side. The other thing --

24 THE COURT: We're -- hold on. Hold on. First of  
25 all, you should be aware that, between the beginning of June

1 and the end of 2017, I have nine Lehman trials already  
2 scheduled. Nine. So the concept that there's calendar room  
3 for this is questionable. That's point number one. Point  
4 number two is, before we embark on this exercise, we're  
5 going to have a conference, okay? So you're all here now.  
6 I'd like you to take a seat. I want to hear the other  
7 matter that's on the calendar, and then we're going to  
8 continue to talk.

9 MS. SCHWARTZ: Okay.

10 THE COURT: All right? Thank you.

11 MS. MARCUS: Your Honor, the next matter on the  
12 calendar, it's an uncontested matter, and it's going to be  
13 handled by Wollmuth.

14 THE COURT: This is --

15 MR. STRONG: This is matter number 5 on the agenda  
16 for today.

17 THE COURT: This is the post-petition interest?

18 MR. STRONG: The LBHI's second motion in aid of  
19 the indemnification claim's ADR order.

20 THE COURT: All right.

21 CLERK: Do you have the (indiscernible)?

22 THE COURT: I mustn't have the right agenda.

23 MR. STRONG: I can pass up the agenda, Your Honor.

24 (Judge confers with Clerk)

25 THE COURT: Okay, the reason for my confusion is

1 because this is different from the agenda that I have. So,  
2 it is not me.

3 MS. MARCUS: Sorry about that, Your Honor.

4 THE COURT: This is -- what you just handed me is  
5 different from the one that I'm looking at. So this is an  
6 uncontested matter than relates to ADR.

7 MR. STRONG: Yes, Your Honor.

8 THE COURT: Okay. I'm sorry. Just trying to be  
9 clear.

10 MR. STRONG: That's fine, and I apologize for any  
11 confusion with regards to the agenda.

12 This motion that we're here for today, first let  
13 me note my appearance. Fletcher Strong of Wollmuth Maher &  
14 Deutsch here on behalf of the Debtors. Also with me is my  
15 colleague, Jim Lawler, the partner on the case. The motion  
16 on the Court's calendar for today is LBHI's second motion in  
17 aid of the indemnification claim to the ADR order. And as  
18 background, the Court entered the indemnification claims ADR  
19 order June 2014, which created a mandatory mediation process  
20 to resolve thousands of contractual indemnification claims  
21 that Lehman holds against originators and other sellers of  
22 defective mortgage loans to Lehman.

23 THE COURT: Right. So this is going forward --  
24 the objectors with -- the order as it applies to certain  
25 objectors is being adjourned out to the June date.

1 MR. STRONG: Yes, Your Honor. That's correct.

2 THE COURT: Okay. All right.

3 MR. STRONG: There were four objections filed, all  
4 objectors and all informal objectors that have reached out  
5 to Debtor's counsel have been notified of the adjournment to  
6 the June hearing.

7 THE COURT: Okay, got it. So we're carving out  
8 K&B Capital, Selco Community Credit, Skyline and  
9 TargetRate.com.

10 MR. STRONG: Correct, Your Honor.

11 THE COURT: Okay. All right, so you'd like me to  
12 enter the order with respect to the non-objecting parties?

13 MR. STRONG: Correct. We anticipate filing of the  
14 revised proposed order later today.

15 THE COURT: Okay. All right. Now that I see what  
16 you're talking about, I'm good, and we'll enter that order  
17 when we get it.

18 MR. STRONG: Okay, thank you, Your Honor.

19 THE COURT: All right, thank you very much. Sorry  
20 for the confusion. Let me hand this back to you. Thanks.  
21 Okay?

22 MS. MARCUS: I apologize for the confusion, Your  
23 Honor.

24 THE COURT: No problem.

25 MS. MARCUS: I think maybe what happened was we

1 had sent an advance version and then as always happens,  
2 things changed, so.

3 THE COURT: Yes, it gets updated. Okay.

4 MS. MARCUS: Apologies for that.

5 THE COURT: No problem.

6 MS. MARCUS: So the last item on the agenda, it is  
7 the last for today, is number six, and it's the plan  
8 administrator's five hundredth ninth objection to claims,  
9 ECF No. 51006.

10 THE COURT: Right. Okay. So on that one, I have  
11 the original document and then I have three objections, one  
12 with respect to each of the three claims, and then there's a  
13 supplement with respect to claim 66154, and then looking out  
14 there, I'm also aware that there's now a motion to abstain.

15 MS. MARCUS: That's correct. Your Honor,  
16 actually, three supplements, one for each of the objections.

17 THE COURT: One for each one, okay. All right, so

18 --

19 MS. MARCUS: And the Debtor's reply that was filed  
20 on Friday.

21 THE COURT: Okay. So how shall we approach this?

22 MS. MARCUS: Well, I think we have a gating issue,  
23 that's the elephant in the room --

24 THE COURT: Yes, right.

25 MS. MARCUS: -- so why don't we talk about that

1 first?

2 THE COURT: The tolling agreement. Is that the  
3 one? Is that the elephant?

4 MS. MARCUS: That's it.

5 THE COURT: Okay.

6 MS. MARCUS: So, Your Honor, as you know, because  
7 you obviously read the papers, the Iron Bridge entities have  
8 attached to their pleading a copy of a tolling agreement,  
9 which they contend precludes the plan administrator from  
10 moving forward today. As noted in our reply, the language  
11 of the tolling agreement appears to preclude the prosecution  
12 of the objection. However, as we've noted, we believe that  
13 the Iron Bridge entities are estopped from relying on the  
14 tolling agreement at this late date.

15 THE COURT: The thing that I don't understand is  
16 looking at the tolling agreement, it can be terminated on 30  
17 days' notice.

18 MS. MARCUS: That's correct, Your Honor. Why  
19 didn't we do it? Because we didn't realize that the tolling  
20 agreement covered under the Garfield County action  
21 (indiscernible) the claims.

22 THE COURT: The claims?

23 MS. MARCUS: Yes.

24 THE COURT: Okay. Well, I appreciate that because  
25 you might have made the argument, actually, that while it

Page 67

1 tolled the latter, the Garfield County action, that you  
2 never intended to give up the ability to prosecute the  
3 claims, so -- but then -- so, if I read the tolling  
4 agreement correctly, which is just on 30 days' notice you  
5 can terminate it, I mean, we can either get started today or  
6 you can give the notice today and we can come back in 30  
7 days.

8 MS. MARCUS: That's exactly what I was going to  
9 say, Your Honor, and we just think, having been through  
10 everything we've been through, I mean, the objection was  
11 filed in September, adjourned repeatedly for months and  
12 months and months --

13 THE COURT: Right, so, I mean, as I -- you know,  
14 as you know, I like to be practical. I don't really like to  
15 waste everyone's time. So.

16 MS. MARCUS: That's what we'd like Your Honor to  
17 do, but obviously --

18 THE COURT: Okay.

19 MS. MARCUS: -- Mr. Barber may have a different  
20 view.

21 THE COURT: Yes.

22 MR. BARBER: I'm all for practicalities, Your  
23 Honor.

24 THE COURT: Okay.

25 MR. BARBER: Duncan Barber on behalf of the Iron

1 Bridge Creditors.

2 THE COURT: Okay.

3 MR. BARBER: Tracy Klestadt with me here at  
4 counsel table. Thank you for clearing up the snafu on my  
5 fee for pro hoc vice this morning.

6 THE COURT: I didn't do a thing, but you're  
7 welcome.

8 MR. BARBER: So maybe your staff did.

9 THE COURT: Somebody on my staff, okay.

10 MR. BARBER: Right. We filed -- the claim  
11 objection was originally filed in mid-September and long  
12 relationship with Ms. Arthur and Ms. Marcus and we put our  
13 heads together and said we can crack this nut. We failed.  
14 That did result in a claim objection that we filed on March  
15 23rd of this year.

16 A week later, in the tolled litigation in Colorado  
17 that includes the same claims that formed the basis of the  
18 claim objection, the Debtor filed a status report that I  
19 referenced in my papers, continuing to kick that ball down  
20 the road as a result of the tolling agreement.

21 I looked at that, circled back, and said, gee, I  
22 think this is encompassed within it too. Of course, our  
23 goal is, obviously, resolve all claims in one case with one  
24 Judge with all parties. That said, it does seem to me that  
25 -- actually, it's no -- there's no question, the tolling

1 agreement applies, number one. Number two --

2 THE COURT: Okay, but, so Ms. Marcus just said  
3 that if you're going to take that position, then she's being  
4 quite candid, they'll send you a letter notifying you that  
5 it terminates.

6 MR. BARBER: Right. Then I would ask for two  
7 things. Number one, if they do that, I have an assumption  
8 why they haven't, but that's an assumption on my part, but  
9 if they were to do that, I would ask two things. One, our  
10 preliminary stay relief hearing that then will have to get  
11 set be set contemporaneously with our motion to abstain, so  
12 that we just hear those all at once.

13 THE COURT: You -- you know, I read all the papers  
14 but I'm very confused. Is the Colorado action entirely  
15 encompass exactly the same things as the claims and the  
16 claim objection?

17 MR. BARBER: They -- but in terms of the complaint  
18 that's been filed since November of 2011, it duplicates the  
19 core objection to claim that's asserted here to the three  
20 proofs of claim and then adds some tort claims because I  
21 think they think in terms --

22 THE COURT: But I'm just, you know, I still don't  
23 understand why all that's going on.

24 MR. BARBER: I'm sorry, why what?

25 THE COURT: I don't -- I just don't understand --

1 just don't understand procedurally why all this is going on.

2 There are claims that are filed here, right?

3 MR. BARBER: Correct. Correct.

4 THE COURT: And then how did that -- and who's the  
5 Plaintiff in that litigation?

6 MR. BARBER: Okay, let me -- let me -- yeah, sure,  
7 let me explain that. We filed proofs of claim --

8 THE COURT: Yes.

9 MR. BARBER: -- here.

10 THE COURT: Right.

11 MR. BARBER: The Debtor sued on the same facts and  
12 transaction debt issue in our proofs of claim in November of  
13 2011. The Debtor is the Plaintiff.

14 THE COURT: Okay.

15 MR. BARBER: Sued these three Claimants --

16 THE COURT: Okay.

17 MR. BARBER: -- and a host of other people that  
18 they say are on our side of the equation, if you will.

19 THE COURT: Okay, and then you entered into the  
20 tolling agreement.

21 MR. BARBER: Yes, and we filed a stay relief  
22 motion. If you're going to file the complaint, we need to  
23 get stay relief so we can defend.

24 THE COURT: Okay, all right.

25 MR. BARBER: We did, they postponed it, they said

1 let's wait --

2 THE COURT: Okay, so pause, pause.

3 MR. BARBER: Okay.

4 THE COURT: Time out. So we're only going to --  
5 so this is only going to happen one place, right? It's  
6 either going to happen here or it's going to happen there.  
7 So Ms. Marcus, what does the plan administrator want to do  
8 here?

9 MS. MARCUS: So, Your Honor, may I speak from  
10 here? Is that okay?

11 THE COURT: Sure, yeah.

12 MS. MARCUS: When we filed the Garfield County  
13 action, we were believing that we could obtain affirmative  
14 relief against the Iron Bridge entities as well as other  
15 defendants. We've come to learn that the Iron Bridge  
16 entities really don't have very much in the way of funds.  
17 In fact, I think one of them, at least one of them may have  
18 been dissolved. So our view is that the claims against  
19 these three entities would be heard here, and if necessary,  
20 we can dismiss the Garfield County action as to those three  
21 entities, not as to the other defendants, however.

22 THE COURT: Okay.

23 MR. BARBER: The issues in Garfield County are  
24 exactly just --

25 THE COURT: Okay, but she just said, Ms. Marcus

1 just said she's going to let you out of that action.

2 MR. BARBER: You know, that hasn't happened. The  
3 way things are currently postured, that has not happened.

4 And there is --

5 THE COURT: Look, we're now -- let's introduce the  
6 other elephant in the room, okay? You'd rather have your  
7 claims resolved in Colorado than here. Let's face it.

8 MR. BARBER: Actually, we'd rather have all of it  
9 resolved with all the defendants.

10 THE COURT: She can't -- Ms. Marcus can't do that  
11 because their other defendants are not subjects to this  
12 Court's jurisdiction.

13 MR. BARBER: Okay, let's --

14 THE COURT: Mr. Barber?

15 MR. BARBER: Yeah? There's another important  
16 point.

17 THE COURT: The important point is the following:  
18 that the practical solution is either you agree today that  
19 the tolling agreement doesn't apply, or if you don't, Ms.  
20 Marcus is going to be good to her word and I'll hold her to  
21 it, she'll send a notice and we'll run out the 30 days. In  
22 the meantime -- in the meantime, unless you take the  
23 position that her filing a motion or a notice of  
24 discontinuance with respect to your clients in the Colorado  
25 action is itself barred by the forbearance agreement, which

1 you may, then she will also, within a period of time which  
2 she will commit to, on the record, endeavor to do that. You  
3 will -- your clients will then be no longer involved in the  
4 lawsuit in Colorado in which Lehman is the Plaintiff. You  
5 then no longer have an argument to do anything but have your  
6 claim resolved here, like any other Creditor.

7 MR. BARBER: I think the tolling agreement  
8 applies.

9 THE COURT: Okay, so you're not going to be  
10 practical. Ms. Marcus, you're going to have to send a  
11 letter, which, to clarify, Mr. Barber, if you believe that  
12 the prior -- that that means that prior to the 30 days, Ms.  
13 Marcus can't take any steps to dismiss your client out of  
14 the lawsuit that's pending in Colorado. Does the tolling  
15 agreement preclude her from doing that?

16 MR. BARBER: I think technically it does, okay?  
17 And my clients aren't here for me to talk to them, okay?

18 THE COURT: But this is a -- this is a technical,  
19 legal point, and I'm sure that they're going to take your  
20 advice on it, so why don't we do this, Ms. Marcus? Why  
21 don't we leave it that you're going to have to issue your  
22 notice, and then Mr. Barber, if you would get -- after  
23 you've had an opportunity to confer with your clients, get  
24 back to Ms. Marcus and let her know if your position is that  
25 the tolling agreement precludes her from taking any

Page 74

1 necessary action, I have no idea what it is, in Colorado to  
2 either move by notice or by motion, to dismiss your clients  
3 from the Colorado action. If your position is that she's  
4 free to do that sooner than the running of the 30 days, Ms.  
5 Marcus, you can proceed --

6 MS. MARCUS: Yes, Your Honor.

7 THE COURT: -- to do that. If the position is  
8 that the 30 days has to run, then you can do it on the 31st  
9 day after the giving of your notice.

10 MR. BARBER: Okay. We're talking about elephants  
11 in the room. Can I identify one other?

12 THE COURT: Sure.

13 MR. BARBER: Okay.

14 THE COURT: Other than Mr. Klestadt?

15 (Laughter)

16 MR. BARBER: He's obvious. A core issue between  
17 the Debtors and Iron Bridge and the affiliate -- and the  
18 people affiliated with Iron Bridge, okay, is the  
19 construction defect litigation, which I've been told you're  
20 aware of, okay?

21 THE COURT: Yes.

22 MR. BARBER: That construction defect litigation  
23 had one tiny bit more to go that will queue it up in a  
24 correct posture for the Debtor and the Iron Bridge side to  
25 determine liability between them for what happened. The

1 arbitration award was entered, the jury verdicts were  
2 entered. The jury -- there's a bunch of motions surrounding  
3 the jury verdicts. They haven't been reduced to judgment.  
4 The Judge yesterday sent a -- set a hearing for July 10th to  
5 resolve those pending motions, which shortly thereafter, we  
6 all anticipate that the jury verdicts will be committed to  
7 judgment. At that point, it will now be a time when claims  
8 between the Debtor and the Iron Bridge side will have to be  
9 determined as between them.

10 THE COURT: Okay.

11 MR. BARBER: Okay?

12 THE COURT: Okay in the sense that I hear you,  
13 okay.

14 MR. BARBER: I hear you, right, and I'm just  
15 trying to get that on the table because that's an important  
16 part of what will be resolved in this claim.

17 THE COURT: Okay. All right. All right, so Ms.  
18 Marcus, do you disagree with Mr. Barber's characterization  
19 of the impact of that particular aspect?

20 MS. MARCUS: Well, Your Honor, first of all, I  
21 certainly wasn't aware that the Judge had set a July 10th  
22 hearing which --

23 MR. BARBER: I found out yesterday.

24 MS. MARCUS: -- I'll be glad to hear. I don't  
25 know if Ms. (indiscernible) knew either. Our view is that

1 that litigation is really separate and apart from these  
2 claims, but if you give me a moment to consult with my  
3 client --

4 THE COURT: Okay, but I guess the point is that if  
5 that's going to happen on July 10th, then we get to the same  
6 place by giving you an adjourned hearing date subsequent to  
7 that time, and -- I mean, I'm flying blind at this point,  
8 because this is all news to me.

9 MR. BARBER: From a practical standpoint,  
10 (indiscernible) me, let's see what the Judge does do.

11 MS. MARCUS: May I have a moment to consult, Your  
12 Honor?

13 THE COURT: Sure. Sure.

14 (Counsel confers with client off the record.)

15 THE COURT: Look, you know, Ms. Marcus, as you  
16 know, Mr. Barber, I'll say it to you, Mr. Klestadt knows as  
17 well, I'm not going to -- I don't want to ambush anybody, so  
18 to the extent that we are all -- new facts are emerging as  
19 we're all here and you need time to figure out how  
20 everything fits together, that's completely fine. I don't  
21 want to prejudice anybody from being able to do a thoughtful  
22 analysis of where things stand. My bottom line message  
23 remains the same, is that I'd like to be practical and you  
24 did indicate that you were talking settlement and that you  
25 got to an impasse. If you believe that additional

1 settlement discussions would be fruitful, that would be  
2 great. If you think that you might be assisted by one of my  
3 colleagues who don't have a lot of free time these days but  
4 tend to say yes when I ask them to do something, that would  
5 be another option. It does sound -- to me, looking at the  
6 merits, this is crying out to be settled.

7 MS. MARCUS: Your Honor, you took the words right  
8 out of my mouth. In fact, that's exactly what I was going  
9 to say, that these claims, they're significant, obviously,  
10 for the Claimants, they're significant for the Rose Branch  
11 estate, but in the scheme of Lehman as you heard Ms.  
12 Schwartz say, they're not very significant claims.

13 THE COURT: So, Mr. Barber, would your clients --  
14 could you inquire as to whether, free of charge, your  
15 clients would be interested in participating in a mediation  
16 under the auspices of a sitting Judge in this building?

17 MR. BARBER: I definitely will ask.

18 THE COURT: Or in the Southern District of New  
19 York.

20 MR. BARBER: Yeah. Okay, my personal practice  
21 style, we've never met, is keep at settlement, if you can  
22 get it, you get there.

23 THE COURT: We did meet years ago, you just don't  
24 remember.

25 (Laughter)

1 MR. BARBER: Now, that's a hamper.

2 THE COURT: Now that's going to make your really  
3 nervous because I remember and you don't.

4 MS. MARCUS: Your Honor, if I might add, I think  
5 that one of the issues that we've been struggling with in  
6 terms of trying to get to a settlement is that the Claimants  
7 here believe, and I believe that it's a sincere belief, that  
8 their claims are very much wrapped up with the homeowners'  
9 litigation and the arbitration proceeding in Colorado --

10 THE COURT: And you don't?

11 MS. MARCUS: -- and we don't.

12 THE COURT: Right.

13 MS. MARCUS: And that's been the stumbling block.

14 THE COURT: But I think that -- I think that if we  
15 -- if we teed up a mediation, and I have a couple of my  
16 colleagues in mind who are particularly experienced in just  
17 exactly this type of dispute, it might be an illuminating  
18 exercise for everyone. If there's a issue of -- I don't  
19 know if there's a hardship issue in having one of your  
20 clients come to New York?

21 MR. BARBER: Your Honor, a settlement necessarily  
22 includes the defect litigation.

23 THE COURT: But the --

24 MR. BARBER: Okay, but is there a hardship issue,  
25 no, there's not a hardship issue. Can I have a -- can I

1 have a client representative or representatives here with me  
2 in New York for a mediation? Absolutely.

3 THE COURT: Okay. I mean, look, if you -- I mean,  
4 everything would be on the table, and that would be one of  
5 the issues on the table. You know, if the parties agree,  
6 then there wouldn't be a need for a mediation. Obviously,  
7 you don't agree and I imagine that -- you have to get more  
8 information around exactly what's going to happen in this  
9 July date because that seemed to be a new fact. So why  
10 don't you have conversations --

11 MR. BARBER: I definitely will.

12 THE COURT: -- all right, and you know, we'll say  
13 that the 30-day -- you know, you're going to have to deal  
14 with the procedural issues as well. I would encourage you  
15 to come to some kind of a global resolution, but in the  
16 absence of that, Ms. Marcus, you'll file the piece of paper  
17 you have to file, and then, you know, just let me know and I  
18 will make a couple of phone calls and I think that -- I  
19 think it would be a positive experience.

20 MR. BARBER: Great.

21 MS. MARCUS: Okay.

22 THE COURT: The price is certainly right.

23 MR. BARBER: Appreciate it.

24 MS. MARCUS: Thank you, Your Honor.

25 THE COURT: All right, so I'm going to adjourn

Page 80

1 this without date and I'll leave it to the two of you just  
2 to get back to my Chambers with what you want to happen  
3 next, and if we don't hear from you after a certain amount  
4 of time, we will be calling.

5 MS. MARCUS: You know how to find us, and Your  
6 Honor, what do we do in the meantime about Mr. Klestadt's  
7 extension motion? That's on for June 2nd. It'll be part of  
8 that --

9 MR. BARBER: (Indiscernible) contract  
10 (indiscernible).

11 MS. MARCUS: Okay. Okay, perfect. Thank you,  
12 Your Honor.

13 MR. BARBER: And a Shelley Chapman is scratching a  
14 memory back there.

15 THE COURT: Yup. You'll figure it out.

16 MR. BARBER: I'm going to. Thank you, Your Honor.

17 MR. KLESTADT: Thank you, Your Honor.

18 MS. MARCUS: That concludes the hearing, Your  
19 Honor.

20 THE COURT: All right. Ms. Marcus, do you want to  
21 remain for the conference?

22 MS. MARCUS: Yes.

23 THE COURT: Okay, thank you. So I think what  
24 we'll do so that we can have a more productive discussion is  
25 just go -- go into the conference room.

1 MS. SCHWARTZ: Your Honor, is it possible to stay  
2 on the record because of the possible appeal issues?

3 THE COURT: I'd like to have a conference.

4 MS. SCHWARTZ: Thank you, Your Honor.

5 THE COURT: Thank you.

6

7 (Whereupon these proceedings were concluded at  
8 11:38 AM)

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 | INDEX

2

## RULINGS

4

5 Hearing re: Doc #13493 Trustees Motion 11 19  
6 for an Order Authorizing the Abandonment  
7 of Certain Lehman Brothers Inc. Data

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 C E R T I F I C A T I O N

2

3 I, Sonya Ledanski Hyde, certified that the foregoing  
4 transcript is a true and accurate record of the proceedings.

5 **Sonya Ledanski**  
6 **Hyde**



Digitally signed by Sonya Ledanski Hyde  
DN: cn=Sonya Ledanski Hyde, o=Veritext,  
ou, email=digital@veritext.com, c=US  
Date: 2016.05.11 16:31:59 -04'00'

7

8 Sonya Ledanski Hyde

9

10

11

12

13

14

15

16

17

18

19

20 Veritext Legal Solutions

21 330 Old Country Road

22 Suite 300

23 Mineola, NY 11501

24

25 Date: May 11, 2016